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In The
Supreme Court of the United States
October Term, 1995

STATE OF IDAHO; PHIL BATT, Governor; PETE CENAR-RUSA, Secretary of State; ALAN G. LANCE, Attorney General; J.D. WILLIAMS, Controller; ANNE FOX, Superintendent of Public Instruction; KEITH HIGGINSON, Director, Dept. of Water Resources; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

Petitioners,

COEUR D'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the United States of America; ERNEST L. STENSGER, LAWRENCE ARIPIA, MARGARET JOSE, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of Coeur D'Alene Tribe,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA,
ALASKA, ARIZONA, ARKANSAS, COLORADO,
CONNECTICUT, FLORIDA, HAWAII, IOWA, MICHIGAN,
MINNESOTA, MISSOURI, MONTANA, NEBRASKA,
NEVADA, NEW YORK, OHIO, OKLAHOMA, SOUTH
DAKOTA, UTAH, WASHINGTON AND WISCONSIN
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Do Eleventh Amendment principles enunciated in *Seminole Tribe v. State of Florida*, ___ U.S. ___, 116 S. Ct. 1114 (1996), preclude application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to permit a federal court to grant judicial relief amounting to quiet title to a state's navigable waters?
2. May an executive order be construed to defeat the claims of a future state to its navigable waters in the absence of specific intent or statutory authority?

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INTEREST OF AMICI

Although many of the states represented in this brief have navigable waters running adjacent to or through Indian reservations, the proper scope of this case goes far beyond disputes between tribes and states. If all that is necessary to sue states in federal courts is the use of an officers' suit, coupled with declaratory relief, and the allegation that federal law is being violated, little will remain of the Eleventh Amendment's purpose of preventing states from suffering "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), quoted in *Seminole Tribe v. State of Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996). This is particularly egregious where the issue is quiet title to the navigable waters of a state – held under the equal footing doctrine as an incident of sovereignty.¹

Since the initial boundary between a state's navigable waters and private upland is determined by federal legal principles, *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), virtually any waterfront land owner might attempt under the decision below to utilize an injunctive action in the federal courts to litigate what is essentially a local real property dispute. This would burden federal courts with disputes that properly belong in state court.

¹ Of course, the equal footing doctrine does not apply to the original states, such as *amicus* Connecticut. Basic principles governing sovereign ownership of the beds of navigable waterways, however, do apply equally to all 50 states, as do *amicus's* concerns about the proper scope of the Eleventh Amendment. See, e.g., discussion at p. 17, *infra*.

The ability of state courts to entertain such controversies is not in question. Indeed, not until 1875 did the federal courts exercise full federal question jurisdiction. 13 Charles A. Wright, et al., *Federal Practice and Procedure: Jurisdiction*, 2d § 3503, pp. 9-10 (1984). Since 1875, the caseload of federal courts has increased precipitously. "The reality is that today there is a mad rush to the federal courts." *Id.* at § 3510, pp. 43-44. There is no reason to add to that burden by encouraging the filing of quiet title actions in the guise of officers' suits.

The second issue in this case – the question of the executive's authority to reserve states' sovereign lands and waters – will not only arise in other public land cases, but in a broader context as well. As we observed in our brief supporting Idaho's petition for certiorari, the Department of the Interior recognizes 306 tribes in the lower 48 states and another 197 in Alaska. Approximately fifty-two million acres of trust land are held by tribes and individual Indians. Wilkinson, *American Indians, Time and the Law* 8 (1987). "Additionally, western states contain millions of acres of federal lands withdrawn before statehood by executive order." If any order of the executive branch, however vague and unsupported by express congressional intent, can suffice to defeat a state's equal footing rights, the federal courts will be inundated with new claims, inspired by the decision below.

SUMMARY OF ARGUMENT

This case involves first and foremost the doctrine of sovereign immunity as enunciated in *Hans v. Louisiana*, 134 U.S. 1 (1890) – a rule described by this Court as one

which "[f]ound its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations'." *Seminole Tribe*, 116 S. Ct. at 1130, quoting *Hans v. Louisiana*, 134 U.S. at 17, in turn quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). State sovereign immunity presupposes that under our constitutional structure, "[t]he states entered the federal system with their sovereignty intact; the judicial authority in Article III is limited by this sovereignty." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); see *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984).

In light of these rules, the abuse of the officers' suit where a plain and speedy state remedy exists should not be permitted.

The principles that are applicable here have all been set forth in *Seminole Tribe* and earlier decisions:

1. The strictures of sovereign immunity cannot be avoided by suing government officials to obtain relief which in fact is only available through a suit against the government itself. Cf. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982); *Block v. North Dakota*, 461 U.S. 281 (1983).
2. Where a detailed statutory remedy exists, as for quiet title, an officers' suit may not be substituted for that remedy. *Seminole Tribe*, 116 S. Ct. at 1132; *Block*, 461 U.S. at 273.
3. The federal government is one of enumerated powers. Accordingly, the authority of the executive branch must come from constitutional or statutory bases. The President has no independent authority to set aside reservations if the effect is to defeat a future state's rights under the Equal Footing doctrine; nor

may such a reservation be made without an "intention . . . definitely declared." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

4. Conveyances of navigable waters, held in trust for future states, may not be inferred in the absence of express intent on the part of Congress. *Montana v. United States*, 450 U.S. 544, 552 (1981).

Above all, construction of the constitutional demarcation between the residual sovereignty of states and the federal judicial power must rest on what Justice Black described as "our Federalism":

"[A] system in which there is sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

STATEMENT OF CASE

The Coeur D'Alene Tribe seeks to establish title to all the navigable waters, including Lake Coeur D'Alene, within the Tribe's reservation. In order to do this, it must defeat the claims of the State of Idaho, which, absent a valid pre-statehood reservation, acquired title to those waters upon statehood under the Equal Footing doctrine. Idaho's quiet title laws provide a clear and adequate remedy for that determination. Rather than resorting to a quiet title action in state court, however, the Tribe brought an officers' suit against various state officials

seeking to restrain them from asserting any interest in the waters. The Tribe bases its claim on an executive order, unsupported by statute and imprecise in its terms, that allegedly included the lake within the reservation prior to Idaho's statehood.

The Ninth Circuit upheld the Tribe's claim to federal jurisdiction under the *Ex parte Young* doctrine, 209 U.S. 123 (1908), and then reversing the district court's dismissal of the action. Idaho's petition for certiorari followed.

The determination to enjoin state officers from asserting title claims was, by the appellate court's own admission, singularly unsatisfying, since it left unresolved the State's claim to the lake. Even more significantly, however, the court's decision violated principles of federalism only this year reiterated and affirmed by this Court.

ARGUMENT

I

INTRODUCTION

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states. . . ." *The Federalist*, No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961).

In this case, the Court is called upon once more to police the "state-federal frontier" formed by Tenth and Eleventh Amendment doctrines. See Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 86 (1989); 13 Charles A. Wright, et al., *Federal Practice and Procedure: Jurisdiction*, 2d § 3502, pp. 4-5 (1984). In deciding whether the Eleventh Amendment permits trial of Idaho's title to its navigable lakes, acquired as an incident of sovereignty on admission to the union, *United States v. Oregon*, 295 U.S. 1, 14 (1935), the Court should affirm its commitment to the basic principles of federalism set forth in *Seminole Tribe*. If, as the court below holds, a state's constitutional equal footing rights to its navigable waters may be effectively determined by suing a handful of state officers in federal court, the state sovereignty recognized in the Tenth and Eleventh Amendments to the Constitution will be a nullity. Reason, historic precedent and this Court's recent decisions refute the lower court's holding that the Eleventh Amendment may be avoided by a trick of pleading.

Although this case does not directly involve the issues dealt with in *Seminole Tribe*, that decision illumines the applicable law and lights the way to a proper result. This case, unlike *Seminole Tribe*, does not require the Court to ascertain whether Congress intended to abrogate state sovereign immunity, or whether it had power to do so. Immunity is there, and no federal statute purports to remove it. *Coeur D'Alene Tribe v. State of Idaho*, 42 F.3d 1244, 1255 (9th Cir. 1994). This case merely calls for application of well-established principles of federalism, inherent in our system and enunciated in the Tenth and Eleventh Amendments.

II

AN OFFICERS' SUIT CANNOT BE USED AS A SUBTERFUGE TO CIRCUMVENT THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

A. The *Ex parte Young* Doctrine Is Limited In its Scope And Application.

In *Seminole Tribe*, this Court solved a riddle that has long perplexed legal scholars: how to resolve the tension between the states' sovereign immunity encapsulated in the Eleventh Amendment and the judicial power over all federal questions set forth in Article III. See Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61 (1989); Jackson, *The Supreme Court, the Eleventh Amendment*; and Jackson, *State Sovereign Immunity*, 98 Yale L.J. 1, 125 (1988). It did so by finding inherent limitations in the power of Congress to abrogate the states' immunity. *Seminole Tribe*, 116 S. Ct. at 1131-32.

This Court has characterized state sovereign immunity as an "implicit limitation" on the judicial power of the United States. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 496 (1987), (Scalia, J., concurring in part and concurring in judgment), resting on the "inherent nature of sovereignty;" *Great Northern Life Ins. Co. v. Reed*, 322 U.S. 47, 51 (1944). Under these principles, it has been clear since *Hans v. Louisiana*, 134 U.S. 1 (1890), that a state may not be sued in federal court by citizens of another state, its own citizens, or a foreign government. *Monaco v. Mississippi*, 292 U.S. 313 (1934).

However, an exception to the general rule has been often recognized in the form of the officers' suit, based on the fiction that if a state official violates the law, he is

stripped of his official or representative character and may be made personally liable for the consequences of his official conduct. *Ex parte Young*, 209 U.S. 123 (1908).

The *Ex parte Young* doctrine has been applied to require state officers to implement a federally-mandated remedial education program [*Milliken v. Bradley*, 433 U.S. 267 (1977)] to notify federal beneficiaries of their rights under a welfare scheme [*Quern v. Jordan*, 440 U.S. 332 (1979)] and to perform a variety of acts found to constitute federally-imposed legal duties. However, *Ex parte Young* is not a universal panacea. It cannot be involved merely by naming an officer instead of the sovereign, because "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687 (1949). And it may be inapplicable under a variety of circumstances in light of principles of federalism and comity:

1. It does not apply where the remedy sought will result in depletion of the state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974);
2. It does not apply to mere tortious acts by state officers acting within their authority. *Larson*, 337 U.S. at 682. In this case, the Tribe conjectures that the state officers named all may perform undefined acts inconsistent with its asserted dominion over the State's navigable waters. However, *Larson* holds that such acts may constitute "[a]t most a tortious deprivation of property." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 693. There is no showing here that the state officers named are not acting within the authority of state law, or

that the law is unconstitutional. Cf. *In re New York*, 256 U.S. 490 (1921).

3. The requirement of final state action may prevent its application. While the Supremacy Clause obligates the states to enforce the Constitution and valid federal law, recognition of state sovereignty obligates the federal courts to give the state's judicial and administrative system the first opportunity to fulfill its role. *Williamson County Regional Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985) (no showing of final state administrative action); see also *Prentis v. Atlantic Coast Lumber Co.*, 211 U.S. 210, 230 (1908) (no injunction against state rate-fixing body for confiscatory rates until final action).
4. It is inapplicable where injunctive relief is being sought under state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).
5. The abstention doctrine may prevent federal court adjudications in the interests of comity and federalism. *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* decision recognized the importance of what Justice Black described as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

Although initially applied to criminal proceedings, the *Younger* doctrine has since been utilized in civil cases as well.

See *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (abatement of nuisance); *Juidice v. Vail*, 430 U.S. 327 (1977) (contempt proceeding); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (state judgment lien, appeal bond). It has been recognized as based on a "federalism-based notion of comity," Tribe, *American Constitutional Law* at 203-04, n. 9 (1988), grounded on "the principle that state courts have the solemn responsibility, equally with the federal courts, 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.'" *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974), quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884); see generally Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. at 79 (1989).

Other forms of abstention similarly are based on principles of federalism and comity, e.g., *Buford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (avoidance of needless conflict with state regulatory schemes); *Railway Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (need to permit resolution of unsettled state law). As one writer has stated, "While the Supremacy Clause obligates the states to enforce the Constitution, residual state sovereignty principles should, and often do, operate to give the state courts and administrative systems the first opportunity to fulfill their obligation. The role of the federal judiciary is only to act as a correction in case of state inaction or misconduct." Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. at 85.

B. Principles of Mutuality Require Respect For The States' Sovereign Immunity.

In *Blatchford v. Native Village of Noatak*, 501 U.S. at 775, this Court observed that a controlling factor in finding a

surrender of state sovereignty "inherent" in the plan of the constitutional convention is the element of mutuality. While suits by one state against another are thus permissible, suits by Indian tribes against states cannot be presumed to have been contemplated by the plan of the convention because there was no mutual surrender of tribal sovereignty to the state. *Id.* at 782.

III

AN OFFICERS' SUIT IS NOT AVAILABLE TO DETERMINE TITLE TO PROPERTY

Nowhere is there more reason for the application of state sovereign immunity than to suits involving the title and disposition of a state's real and personal property. As Justice White wrote in *Treasure Salvors*: "Because it is the State itself which purports to own the controverted (waters), and because the very nature of the suit, as defined in the complaint . . . is to determine the State's title to such property, this is not a case subject to the doctrine of *Ex parte Young*." White, J., concurring in part and dissenting in part, 458 U.S. at 702.¹ Since this case goes to possession and control of a state's navigable waters, one of its inherent attributes of sovereignty, application of *Ex parte Young* to avoid sovereign immunity is particularly inappropriate.

¹ "[T]he sensitive areas . . . where consent to suit is likely to be required are . . . the adjudication of interests in property which has come unsullied by tort into the bosom of the government." Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harvard L. Rev. 1, 29 (1963).

A. An Adequate Remedy Exists Under State Law.

This is not a case in which the Tribe has no adequate remedy. Rather, the state has asserted, without contradiction, that Idaho's quiet title law permits a suit against the state in state court. There is no showing that the Tribe would be deprived of a fair hearing on the issues of applicable law. The state court is an appropriate forum for determination of any federally derived right, and its utilization will implement principles of federalism and comity and avoid any unnecessary constitutional questions. *Testa v. Katt*, 330 U.S. 386 (1947). As the Court observed in *Huffman v. Pursue, Ltd.*, 420 U.S. at 611, Article VI of the Constitution binds the courts of every state to enforce federal law. There, the Court properly rejected the "assumption that state judges will not be faithful to their constitutional responsibilities."² The existence of that remedy, and the well-developed doctrines of abstention already applied in the interests of federalism and comity, compel the conclusion that the state court should be given an opportunity to adjudicate this quiet title suit.

B. Where A Comprehensive Remedy Already Exists, The Court Should Not Create A New One.

This Court's recent *Seminole Tribe* opinion teaches that where a complex legislative scheme exists for the resolution of an issue, the courts should not create a new

² Federal review of state court determinations of federal law is, in any event, always available. *Smith v. Reeves*, 178 U.S. 436, 441 (1900); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

one. *Seminole Tribe*, 116 S. Ct. at 1132; see also *Schweiker v. Chilicky*, 487 U.S. 412 (1988). If this is true under the federal scheme, how much more important should it be where, as here, important principles of state sovereignty and federalism are involved? Certainly, this is a case where courts as a matter of prudence should provide no additional remedies. *Seminole Tribe*, 116 S. Ct. at 1132-33.

C. An Officers' Suit May Not Be Used As A Substitute For A Quiet Title Action.

For all practical purposes, the decision below adjudicates the State of Idaho's title in its navigable waters without its consent. It engages in the "fiction" that Idaho's Eleventh Amendment immunity is "meaningfully safeguarded by not formally rejecting the State's claim . . . although (tribal) agents may seize the contested property and federal courts may adjudicate its title. Neither of these novel propositions follow from *Ex parte Young*." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 702-703. White, J. concurring in part and dissenting in part.⁴

⁴ Although a plurality of this Court held in *Treasure Salvors* that a federal court exercising rem admiralty jurisdiction could seize property held by state officials under a claim of state title, the deciding vote was cast by Justice Brennan on the basis that Eleventh Amendment immunity did not extend, in any event, to citizens suing their own state. The case was admittedly full of "procedural complexities and factual glamour." *Id.* 458 U.S. at 683, 717. Justice White described it as an "aberration," *Id.* at 717, a characterization since adopted by knowledgeable commentators. E.g., 13 Charles A. Wright, et al., *Federal Practice and Procedure: Jurisdiction*, 2d § 3524, p. 157 (1984 ed.).

Since sovereign immunity is the basic principle in this case, decisions of this Court dealing with the federal government's immunities are instructive. This Court held in *Block*, 461 U.S. at 282, 284-85, that an officers' suit may not be used as a substitute for a *federal* quiet title action, since it would constitute a device for circumventing Federal sovereign immunity. There is no valid reason why the same rationale should not be applied to *state* sovereign immunity as well.

In hearings on the Federal Quiet Title Act, this Court concluded it was the "predominant view" that citizens asserting title to or the right to possession of lands claimed by the United States were without judicial remedy because of the doctrine of sovereign immunity. *Block*, 461 U.S. at 282. To permit a court-created "end run" around the doctrine by officers' suits, the Court observed, would render nugatory the careful congressional scheme for adjudicating title. It could dispossess the government of the disputed land without affording the option of paying damages, thus permitting "disruptions of costly federal activities." It would also permit institution of "an unlimited number" of stale claims because no statute of limitations would be applicable. *Id.* at 285. Of course the same reasoning is applicable to efforts to circumvent *state* quiet title laws.

Similar reasoning was used in *Malone v. Bowdoin*, 369 U.S. 643 (1962). (Ejectment action against a forest service official from land occupied by him solely in his official capacity constitutes impermissible action against the United States.)

The irrationality of applying an *Ex parte Young* remedy to title disputes, recognized by this Court in the federal context in *Block*, was noted as well by the Court of Appeals below, which observed that even if the Tribe were ultimately to prevail on the merits, neither the State nor Tribe would hold unclouded title to the property. "Our conclusion undoubtedly will not satisfy any of the parties involved," the Court lamented, but it nevertheless determined that jurisdiction must not be declined "to the extent that it exists." *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d at 1255.

IV

AN OFFICERS' SUIT WILL NOT LIE WHERE THE CLAIMED VIOLATION OF FEDERAL LAW IS CLEARLY FRIVOLOUS OR INSUBSTANTIAL

Where a claimed violation of federal law is frivolous or insubstantial, even an otherwise proper claim under the *Ex parte Young* theory must be dismissed. An action against a government official must be construed as one against the government, unless it is not within his statutory powers or their exercise is constitutionally void. *Larson*, 337 U.S. at 682, 701-702. Here, no effort has been made to rebut the historic presumption against federal conveyance of navigable waters held in trust for future states. *Cf. Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222 (1845). Pre-statehood grants may be upheld only under "the most unusual circumstances," *Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 197 (1987), and only "international duty or public exigency" has justified such actions. *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894). As we discuss in more detail in Part V, the Tribe has failed to make the showing requisite to defeat the presumption.

With respect to Indian reservations, the Court has stated that such conveyances are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. at 55. Finally, such a conveyance must leave no doubt that it was intended to "embrace the land under the waters of the stream," *Montana v. U.S.*, 450 U.S. at 552. The presumption against a pre-statehood grant or reservation can only be overcome if it is shown: 1) that Congress clearly intended to include the submerged land within the reservation; and 2) Congress affirmatively intended to defeat the future state's title to the submerged land. *Utah Div. of State Lands v. U.S.*, 482 U.S. at 201-202; see Conference of Western Attorneys General, *American Indian Law Deskbook* 54-60 (1993).

In this case, the executive reservation on which the Tribe relies merely includes various of the State's navigable waters, including Lake Coeur D'Alene, within the reservation boundaries. Nothing in that action had the effect of conveying the beds, banks and waters of the state-to-be to the Tribe.

V

THE TRIBE FAILED TO STATE A CLAIM FOR THE BED AND BANKS OF NAVIGABLE WATERS.

The Court of Appeals erred as well on the question of whether the Coeur D'Alene Tribe states a claim for the bed and banks of the lake and rivers. As a matter of law, the Tribe fails to state such a claim. See *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

A. The Constitution Requires The United States To Hold The Bed And Banks Of Navigable Waters In Trust For The Future States Under The Equal Footing Doctrine.

Ownership and control of the beds of navigable waters has always been an essential part of the sovereignty of the several States. See *Martin v. Waddell*, 42 U.S. (16 Pet.) 367 (1842). This constitutional principle compels a presumption against any pre-statehood conveyance of the bed or banks of navigable water by the prior sovereign, just as there was at common law.

"The domain and property in navigable waters, and in the lands under them, being held by the King as a public trust; the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his case for the common benefit. . . . Grants of that description are therefore construed strictly – and it will not be presumed that he intended to part with any portion of the public domain, unless clear and especial words are used to denote it." *Id.* 42 U.S. at 411 (emphasis added).

In *Martin*, this Court held that the original thirteen states succeeded to the sovereignty of the Crown and took title to the beds and banks of tidally influenced and navigable waters. After *Martin*, this Court ruled that subsequently admitted states also received title to the beds and banks of navigable waters as well, because each state entered the union on an equal footing with the original thirteen states. *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) at 222-223, 229. During the pre-statehood period, the United States held the beds and banks of navigable waters in trust for the future State. *Id.* at 228-29.

State title to navigable waters and their bedlands is not merely a matter of property; it is fundamental to the Constitutional framework:

"[U]nder *Pollard's Lessee*, the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land title is concerned. . . ." *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374; 97 S. Ct. 582 (1977).

Thus, this Court's decisions upholding state title to beds of navigable waters preserve "the Constitutional sovereignty of the states." *Id.* at 381.

Indian reservations are not exempt from the strong presumption against pre-statehood conveyance of the bed of navigable waters. The case of *United States v. Holt State Bank*, 270 U.S. at 49, involved a tribal claim to the bed of a lake within an Indian reservation. There, this Court held that:

"The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional circumstances when impelled to particular disposal by some international duty or public exigency. It follows this that disposal by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was

definitely declared or otherwise made very plain." *Id.* at 55 (emphasis added).

The mere inclusion of a navigable lake within a pre-statehood Indian reservation, therefore, did not convey the navigable waters or lake bed to the Indian tribe. *Id.* at 58.

As recently as 1981, this Court again confirmed that the "strong presumption against conveyance" of navigable waters and their beds applied to a pre-statehood Indian reservation:

"A court . . . must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain,' *United States v. Holt State Bank*, . . . or was rendered 'in clear and especial words,' *Martin v. Waddell*, . . . or 'unless the claim confirmed in terms embraces the land under the waters of the stream.' *Packer v. Bird*, ___ at 672, 34 L. Ed. 819, 11 S. Ct. 210. . . ." *Montana v. United States*, 450 U.S. at 552.

Although the river in *Montana v. United States* ran directly through the Crow Indian reservation, Congress had made no definite declaration that the river bed would be conveyed to the Tribe. Nor was there any proof that Congress intended to alter or defeat the future title of the State of Montana.⁴

⁴ As the Court pointed out in *Montana*, the only case holding otherwise, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), was an anomaly of "very peculiar circumstances" based on a series of broken promises and the ultimate promise of the United States that the lands reserved would never become part of any state. *Montana*, 450 U.S. at 555-56, n.5; see also *Utah Div. of State Lands*, 482 U.S. at 198.

B. Only Congress May Defeat A Future State's Equal Footing Title To Navigable Waters, And Then Only Under Limited Circumstances.

In 1894, this Court held that *Congress* has power to make pre-statehood conveyance of the beds of navigable waters in certain limited and exceptional circumstances. *Shively v. Bowlby*, 152 U.S. at 1. Such circumstances may include pursuit of international obligations or response to a "public exigency." *Id.* at 48-50. This Court, however, has uniformly required "clear and especial words" before finding that Congress intended to convey the beds of navigable waters during the territorial period. Thus, *Shively*, held that "a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any land below high watermark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention". See also *United States v. Pacheco*, 69 U.S. (2 Wall) 587 (1864) (absent express language, land "by the bay" is bounded by ordinary high watermark).

In 1987, this Court once again reaffirmed the strength of the presumption against pre-statehood conveyances of the beds of navigable waters, holding that the United States had not reserved to itself the bed of Utah Lake prior to Utah statehood. *Utah Div. of State Lands v. United States*, 482 U.S. at 193.

When analyzing a claimed pre-statehood conveyance, this Court's decisions from *Shively* to *Utah Division of State Lands*, speak to Congress' power to authorize pre-statehood conveyances:

"We cannot doubt, therefore, that *Congress* has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively*, 152 U.S. at 48, quoted in *Utah Division of State Lands*, 482 U.S. at 196-97 (emphasis added).

With regard to executive power to convey submerged lands, the Court has confirmed that Congress never authorized conveyances that would defeat a future State's title to submerged lands through general delegations to the executive branch. See *Utah Division of State Lands*, 482 U.S. at 197 ("Congress had never undertaken by general land laws to dispose of land under navigable waters"). Instead, Congress has pursued a long-standing policy to authorize a conveyance of submerged lands "only 'in case of some international duty or public exigency.'" *Id.*, quoting *Shively*, 152 U.S. at 50.

Utah Division of State Lands demonstrates the strength of the presumption against including submerged lands in a pre-statehood reservation. Prior to Utah's statehood, Major John Wesley Powell, director of the U.S. Geological Survey ("U.S.G.S."), informed the Secretary of the Interior that the "site of Utah Lake . . . is hereby selected as a reservoir site, together with all lands situated within two statute miles of said lake at high water." Congress had granted the U.S.G.S. express authority to select "sites to

reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows." 25 Stat. 505, 526. The Act further provided:

"[A]ll the lands which may hereafter be designated or selected . . . are from this time henceforth reserved from sale *as the property* of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law." *Utah Division of State Lands*, 482 U.S. at 198-99 (emphasis added).

Nevertheless, the Court held, the United States did not retain title to the bed of Utah Lake when Utah became a state:

"[T]he 1888 Act fails to make sufficiently plain either a congressional intent to include the bed of Utah Lake within the reservation or an intent to defeat Utah's claim to title under the Equal Footing doctrine." *Id.* at 203 (emphasis added).

C. As A Matter Of Law, The 1873 Executive Order Reserving Lands For Use By the Coeur D'Alene Tribe Cannot State A Claim For A Pre-Statehood Conveyance of Submerged Lands.

The Tribe's claim in the instant case is inconsistent with the decisions of this Court from the cases summarized in *Shively* to the present. First, the executive branch had no inherent authority to convey submerged lands. Second, Congress cannot impliedly delegate to the executive power to defeat a future State's equal footing title to

submerged lands. Third, the Tribe points to no Congressional action expressly delegating such power to the executive.

Prior decisions make it clear that the executive had no inherent power to convey submerged lands to Indians. "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1941).

In *Sioux Tribe*, this Court held that the executive had no inherent power to convey general public lands to tribes during the territorial period. The executive merely had power to reserve and manage public lands as a result of Congress's "long-continued acquiescence in the exercise of that power." *Id.*; see also *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (Congress impliedly delegated power through long acquiescence in executive orders reserving lands from mineral laws).

The implied delegation of power to the executive branch found in *Sioux Tribe* and *Midwest Oil Co.* is narrow and limited. After reviewing the history relating to executive creation of Indian reservations, this Court held that Congress would never have understood that the executive was permanently disposing or conveying the reserved lands to the tribes without Congress' approval. The only Congressional understanding was that the executive gave the tribes a revocable license to occupy public lands and to remove such lands from operation of homestead or other general land laws. *Sioux Tribe*, 316 U.S. at 327-28.

The Coeur D'Alene Tribe therefore fails to state a claim because it cannot, merely by citing the executive order, show that Congress intended to authorize conveyance of submerged lands and deliberately intended to defeat the future State of Idaho's equal footing title. First, the Tribe cannot rely on the executive's limited power to convey public lands and therefore must show that Congress delegated the power. Second, Congress' responsibility for preserving the equal footing of future states means that it cannot delegate power by mere acquiescence in an executive order withdrawing lands for Indian use. As shown in *Sioux Tribe*, the implied delegation of power by Congressional acquiescence is limited to authorizing Executive actions that were clear and necessary. Third, the Tribe cites no express Congressional delegation of authority to convey lands and to defeat Idaho's equal footing title.⁵

For *Midwest Oil* to have applied to this case, Congress would have to have known that the 1873 executive order at issue clearly and deliberately intended to convey the bed and banks of navigable waters. The executive order, however, merely provided that:

"It is hereby ordered that the following tract of country in the Territory of Idaho be, and the

⁵ Indeed, yet another hurdle exists. In *State of South Dakota v. U.S. Dept. of the Interior*, 69 F.3d 878 (Eighth Cir. 1995), the court held that 25 U.S.C. § 465, authorizing the acquisition of land in trust for Indian tribes, was invalid because of lack of sufficient specific standards. Here, any applicable statutory authority falls just as short of the "intelligible principles" required by this Court. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

same is hereby, *withdrawn from sale* and set apart as a reservation for the Coeur D'Alene Indians. . . ." 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties*, 837 (1904) (emphasis added).

The 1873 Order did not specifically mention any executive intent regarding permanent conveyance of the bed or banks of navigable waters in derogation of the sovereignty of the future State of Idaho. Congress merely acquiesced in withdrawing certain lands from sale so that they could be used by Indians. However, submerged lands were never for sale prior to statehood under the general land laws.

The Court of Appeals offered no reasoning to support its implicit holding that the executive order might have conveyed the bed and banks of submerged lands. The Court of Appeals only noted that none of its prior opinions "consider[ed] the possibility that such a claim might be defeated by a lack of explicit congressional authorization of the executive order." *Coeur D'Alene Tribe*, 42 F.3d at 1257. Failure to consider an issue in prior cases, however, is not precedent.

As a matter of law, the Tribe's complaint based on the 1873 Executive Order cannot show clear and especial Congressional intent to convey submerged lands. Congress never intended to deprive the future State of Idaho of its constitutional equal footing rights by authorizing permanent conveyance of the submerged lands to Coeur D'Alene Indians.

D. Principles Of Federalism Require Clear and Specific Congressional Intent To Authorize Conveyance Of Lands.

Mere Congressional acquiescence cannot be a basis to upset the Constitutional framework and diminish the sovereignty of future states. Clear and specific Congressional intent must be required to find that the United States authorized a pre-statehood conveyance of submerged lands and altered the sovereignty of a state.⁶ Otherwise, a fundamental part of the federalism and constitutional balance is determined unilaterally by a particular executive action. Changing the constitutional balance, however, should require the deliberate and responsible actions of Congress. Congress must be shown to have deliberately and knowingly intended such an alteration.

The reasoning below contradicts the express limits on executive power found in *Sioux Tribe*. Instead, with an erroneous, over-broad statement, the Court of Appeals effectively overrules *Sioux Tribe* and determines that the

⁶ Compare *Organized Village of Kake v. Egan*, 361 U.S. 60, 75-76 (1962), with *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In *Metlakatla Indian Community*, Congress had granted the Secretary power to make rules governing Indian use of the Metlakatla reservation. See 369 U.S. at 54 and 59. With this express Congressional power, the Secretary could authorize Indian fishing within the reservation boundaries, preempting Alaska law. In contrast, Congress had not granted the Secretary power to authorize the Village of Kake Indian residents to fish contrary to Alaska law and the Secretary had no "inherent authority." See also *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949).

executive branch had all the powers of Congress to convey submerged lands prior to statehood when Congress had no intent to defeat the equal footing title of a future state.

CONCLUSION

The decision below will affect all the states, for it effectively permits the circumvention of state sovereign immunity and the Eleventh Amendment by the enlargement and grossly inappropriate use of the officers' suit. Its particular application – to states' navigable waters, acquired as an incident of sovereignty – is especially egregious, for it needlessly derogates state sovereignty by imposing an inappropriate common law remedy to defeat the constitutional rights of states, even though the lower court admits that the remedy is inappropriate and will not remedy the cloud on title caused by state claims.

A full and adequate remedy exists – in the form of quiet title in state court. Should such a court err in its application of federal law, review is available within the federal judicial system. State courts have adjudicated property disputes – and other disputes – involving questions of federal law since the beginning of the Republic. The opinion below assumes that a state forum is so suspect as to require resort to an officers' suit in federal court to vindicate the Tribe's rights, even though the relief sought is unavailable there. Such a decision hardly does credit to our federal system.

Finally, this abuse of *Ex parte Young* takes place within a context in which basic principles of constitutional law are violated. Despite this Court's repeated admonitions that the navigable waters are held in trust for the future states, and pre-statehood conveyances – to the extent they may be made at all – must be plainly and expressly made by Congress, the lower court found an issue of fact as to whether an executive order showing no intention of such a transfer and unsupported by congressional authority can deprive a future state of one of the incidents of its sovereignty.

The lower court's opinion stems from an unfortunate theory of federalism embodying "ever expanding federal authority at the expense of the states." Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. at 86 (1989). It cries out for correction.

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